

**SAVE ON ENERGY - ENERGY MANAGER PROGRAM**

**PARTICIPANT AGREEMENT**

**THIS AGREEMENT** made as of the [DAY] day of [MONTH], [YEAR] (the “Effective Date”),

**BETWEEN:**

**INDEPENDENT ELECTRICITY SYSTEM OPERATOR**, a corporation governed by the laws of the Province of Ontario,

(the “IESO”)

- and -

[LEGAL NAME OF THE PARTICIPANT], a [LEGAL FORM OF THE PARTICIPANT] governed by the laws of [JURISDICTION OF THE PARTICIPANT] (the “Participant”)

(each of the IESO and the Participant may be referred to as a “Party” and, collectively, the “Parties”).

**WHEREAS** the Participant wishes to access funding made available through the Interim Framework Save on Energy - Energy Manager Program for the purpose of employing an Energy Manager;

**AND WHEREAS** the Participant reasonably expects that it can deliver the Minimum Annual Savings Target plus any applicable Shortfall Amount;

**AND WHEREAS** the IESO has approved the Participant’s application for an Energy Manager;

**NOW THEREFORE** in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

**1. Defined Terms**

All capitalized terms not herein defined will have the meanings given in SCHEDULE “A”.

**2. Minimum Annual Savings Target, Participant Incentive and Payment**

- (a) In each Funding Period, the Energy Manager will implement Projects that result in a minimum of 1,000 MWh (the “Minimum Annual Savings Target”), plus any applicable Shortfall Amount, which Energy Savings will persist, at a minimum, until December 31, 2021.
- (b) In each Funding Period, the Participant is eligible to receive the following participant incentive (the “Participant Incentive”), subject to this Section 2, Section 5 and the Participant satisfying all of its obligations herein contained:

- (i) Within sixty (60) calendar days upon notice to the IESO of the Energy Manager's employment start date in the first Funding Period and within sixty (60) calendar days from the start of each subsequent Funding Period, the "**Start of Funding Period Payment**" calculated, up to a maximum of \$40,000, as follows:

$$\text{Start of Funding Period Payment} = (\text{Minimum Annual Savings Target} - \text{Shortfall Amount}) * (\$40/\text{MWh})$$

- (ii) Upon: (A) meeting the Minimum Annual Savings Target and any applicable Shortfall Amount, and (B) approval by the IESO of the Annual Report, the "**End of Funding Period Payment**" calculated, up to a maximum of \$150,000, as follows:

$$\text{End of Funding Period Payment} = [(\text{Confirmed Annual Energy Savings} - \text{Shortfall Amount}) * (\$40/\text{MWh})] - \text{Start of Funding Period Payment}$$

- (c) If the amount in Section 2(b)(ii) results in a negative value, the End of Funding Period Payment will be deemed to be \$0.
- (d) The maximum Participant Incentive amount payable in each Funding Period is \$150,000 (exclusive of Applicable Taxes), and in no event will the IESO be obligated to pay any additional amounts to the Participant.
- (e) If the Participant exceeds the Minimum Annual Savings Target in any Funding Period, the surplus savings will not be subtracted from the Minimum Annual Savings Target for the following Funding Period, if applicable.
- (f) All payments hereunder will be made in Canadian dollars by cheque or by electronic funds transfer to the Participant's account or such other mode of payment at the sole discretion of the IESO.
- (g) All payments hereunder are conditional on the Participant providing an invoice to the IESO together with sufficient documentation to support and substantiate the payment of the Participant Incentive.
- (h) In addition to the Participant Incentive, the IESO will pay any Applicable Taxes on the Participant Incentive. The Participant will provide to the IESO sufficient supporting documentation, as requested by the IESO, to facilitate and support claiming input tax credits in respect of the Participant Incentive. In addition, if the IESO has reasonable grounds to commence a discussion, negotiation or challenge, in any manner whatsoever, with a tax authority regarding the validity of any Applicable Taxes imposed on the Participant Incentive, the Participant will provide such reasonable assistance as may be required by the IESO with such discussion, negotiation or challenge. For greater certainty, in no event shall the IESO be relieved of its obligations under this Agreement, including the IESO's obligation to pay Applicable Taxes as provided hereunder, pending the outcome of any discussion, negotiation or challenge with a tax authority.

### 3. Participant's Obligations

In addition to all other obligations contained in this Agreement, the Participant will fulfill the following obligations, unless otherwise approved by the IESO:

- (a) engage an Energy Manager, to complete, at a minimum, the Energy Manager Duties;
- (b) employ the Energy Manager on a full time basis for a minimum term of 12 months;
- (c) ensure that the Energy Manager meets the Energy Manager Eligibility Criteria and has the demonstrated technical ability to perform the Energy Manager Duties;
- (d) if the Energy Manager is a current employee of the Participant, the Participant will provide to the IESO a written commitment, from a senior officer, that: i) such employee's previous job has been or will be filled by another employee; or ii) such employee was previously hired by the Participant as an energy manager pursuant to an agreement that provided funding or a financial incentive paid by the IESO and/or a Local Distribution Company (LDC) to the Participant for the employment of an energy manager;
- (e) provide suitable operational support and work supplies to the Energy Manager to allow the Energy Manager to perform the Energy Manager Duties;
- (f) undertake Commercially Reasonable Efforts to achieve the Minimum Annual Savings Target, as evidenced by implemented Projects, documented in the Annual Report and confirmed by the Technical Reviewer; and
- (g) ensure that at least 10% of the Minimum Annual Savings Target is attributed to new Projects arising from or related to the Energy Manager Duties and is not financed by any incentives received from the IESO, the Province of Ontario or the Government of Canada.

The Participant represents and warrants that the Energy Manager is not being employed or retained by the IESO or their respective successors or assigns and that the Participant will have no claim against the IESO or their respective successors in respect of its employment of the Energy Manager by the Participant and shall indemnify, defend and hold the IESO and their respective affiliates, and each of their respective directors, officers, employees, shareholders, advisors, and agents harmless from and against any and all claims, demands, suits, losses, damages, liabilities, penalties, obligations, payments, costs and expenses and accrued interest on, any and all related actions, suits, proceedings for personal injury (including death) or property damage, assessments, judgments, settlements and compromises relating thereto and all connected reasonable lawyers' fees and reasonable disbursements) asserted by a third party against or suffered by the Participant relating to, in connection with, resulting from, or arising out of the negligence or wilful misconduct of the Energy Manager.

#### **4. Energy Manager Continuing Training**

The Energy Manager may be required to participate in workshops, seminars and/or training programs, as directed by the IESO, and the Participant will ensure that the Energy Manager attends such programs.

#### **5. Reporting Obligations**

- (a) The Participant will ensure that the Energy Manager prepares and delivers the following documents to the Technical Reviewer:
  - (i) an Energy Management Plan for the Facility, no later than three (3) months after the Energy Manager's employment start date. The Energy Manager will deliver an updated Energy Management Plan at the start of each subsequent Funding Period, as applicable;

- (ii) a Third Quarter Report (30) calendar days before the end of the third quarter for each 12-month Funding Period;
  - (iii) an Annual Report within (30) calendar days before the end of each Funding Period. The Annual Report must indicate whether the required Minimum Annual Savings Target and any applicable Shortfall Amount for the Funding Period has been achieved; and
  - (iv) any other information requested by the IESO, including information or documentation demonstrating the Participant's ability to meet the Minimum Annual Savings Target or confirming Project Energy Savings and/or in-service dates.
- (b) The IESO and/or the Technical Reviewer will review the Energy Management Plan, the Third Quarter Report and the Annual Report (collectively, the "**Reports**") to ensure timely filing and completeness and to assess Energy Savings and progress from the previous Reports. If the IESO does not approve a Report, the IESO will provide comments and such document must be revised by the Participant in order to address the noted deficiencies and obtain the IESO's approval of such revised Report.
- (c) The Participant is not eligible to receive the Participant Incentive or any portion thereof, until each Report required to be submitted by the Participant for such payment is approved.

#### 6. **Communication with Technical Reviewer**

The Participant will cooperate and provide, on a timely basis, any requested information to the IESO and/or the Technical Reviewer should the IESO or the Technical Reviewer require clarification from the Participant related to any Reports or information required under this Agreement.

#### 7. **Term, Termination and Survival.**

- (a) The term of this Agreement commences as of the Effective Date and expires on December 31, 2021, (the "**Term**"), unless terminated earlier in accordance with the terms of this Agreement. The Term of this Agreement may be extended by the IESO, acting in its sole and absolute discretion, upon written notice to the Participant. Any extension is subject to the Participant being in compliance with its obligations herein, and provided the Energy Manager Program remains available. The Participant acknowledges that the Term may not extend past December 31, 2021.
- (b) The first Funding Period commences as of the employment start date of the Energy Manager and expires on the date which is 12 months from the Energy Manager's employment start date, unless terminated earlier in accordance with the terms of this Agreement. After the expiry of the first Funding Period (and after the expiry of any subsequent Funding Period), the IESO, acting in its sole and absolute discretion, may extend funding for the employment of an Energy Manager to the Participant for an additional 12-month Funding Period, or shorter, upon written notice. Any extension is subject to the Participant being in compliance with its obligations herein, provided the Energy Manager Program remains available, and subject to the expiration or termination of this Agreement. The Participant acknowledges that the term of a Funding Period may not extend past December 31, 2021 or the Term of this Agreement.

- (c) For certainty, after each Funding Period expires or is earlier terminated, the IESO will not be required to pay and the Participant will not be eligible for a Participant Incentive, in part or in full, for any period during the Term following such date if the IESO has not extended funding to the Participant for an additional Funding Period pursuant to Section 7(b).
- (d) The IESO may terminate this Agreement or a Funding Period immediately, or withhold the Participant Incentive, in part or in full, where any of the following occurs:
  - (i) the Participant fails to have an Energy Manager in place for a period of ninety (90) calendar days;
  - (ii) the Participant fails to observe or perform any obligation required to be observed or performed under this Agreement and such failure continues for a period of thirty (30) calendar days after the delivery of written notice by the IESO to the Participant to cure such failure;
  - (iii) the Participant fails to undertake Commercially Reasonable efforts to achieve the Minimum Annual Savings Target of 1,000 MWh for the 12-month period of this Agreement plus any applicable Shortfall Amount; or
  - (iv) the Participant becomes or is declared Insolvent, becomes the subject of any proceeding related to its liquidation or insolvency which is not dismissed within ninety (90) calendar days, or makes an assignment for the benefit of creditors.
- (e) Upon termination of this Agreement or a Funding Period pursuant to Section 7(d), the Participant will promptly repay any Start of Funding Period Payment paid under Section 2(b)(i) for the then current Funding Period.
- (f) The IESO may also terminate this Agreement or any Funding Period upon sixty (60) calendar days' notice by the IESO.
- (g) Sections 2, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 21 and 25, and such other provisions as are necessary for the interpretation thereof and any other provisions hereof, the nature and intent of which is to survive termination or expiration of this Agreement, will survive the expiration or termination of this Agreement.

## 8. Environmental Attributes

All right, title and interest in and to all benefits or entitlements associated with Environmental Attributes arising in relation to the electricity savings funded by an amount paid under this Agreement are hereby unconditionally and absolutely transferred and assigned, or to the extent transfer or assignment is not permitted, held in trust for, by the Participant to, or in favour of, the IESO. The Participant acknowledges that the IESO may direct the Participant to take such actions and do all such things necessary to certify, obtain, qualify and register with the relevant authorities or agencies such Environmental Attributes for the purpose of transferring, assigning, or holding in trust, such Environmental Attributes to and for the IESO and the Participant shall comply with such directions, and the Participant will be entitled to reimbursement of the cost of complying with such direction,

provided that the IESO, acting reasonably, has approved such cost in writing prior to the cost being incurred by the Participant.

#### **9. Representations and Warranties**

The Participant represents and warrants to the IESO as follows, and acknowledges that the IESO is relying on such representations and warranties in entering into this Agreement:

- (a) the Participant would not have undertaken the employment of an Energy Manager without the Participant Incentive;
- (b) the Participant is a Customer and/or operates the Facility of a Customer;
- (c) the Participant meets the Program Eligibility Criteria;
- (d) the Participant has the potential to deliver the Minimum Annual Savings Target;
- (e) the Participant is not Insolvent;
- (f) the Participant has executed and delivered the Release, Waiver and Consent, and has not taken any actions to amend or suspend it or to terminate its existence and it continues in full force and effect as of the date hereof; and
- (g) the Participant is acting on its own behalf.

The representation made in Section 9(a) is provided as of the Effective Date of this Agreement. All other representations and warranties provided in this Section 9 will be continuing throughout the Term of this Agreement, and any change in the accuracy of such representations and warranties will immediately be communicated by the Participant to the IESO.

#### **10. Evaluation, Monitoring and Verification; Audit**

- (a) The performance and administration of this Agreement will be subject to the IESO EM&V Protocols, which will include evaluation of the effectiveness of this Agreement in meeting the objectives of the Energy Manager Program. In furtherance of the IESO EM&V Protocols, the Participant will cooperate with the IESO and their respective designates and will make available such information in the form and with the frequency as may be reasonably prescribed, including with respect to historical electricity consumption.
- (b) The Participant and the IESO will both keep complete and accurate books, accounts and records and all other data required by each of them respectively for the purpose of proper administration, monitoring and verification of this Agreement and all such records and data will be maintained during the Term of this Agreement and for the period of time thereafter which is the greater of seven years and the period of time specified under Applicable Law. On reasonable notice, at any time during normal business hours, the Participant will provide reasonable access to the IESO, and/or their respective designates to such books, accounts, records and data and: (A) at the reasonable request of the IESO, make available to the IESO and/or their respective designates, the personnel of the Participant and its subcontractors involved in the operation of the Participant's business and the maintenance of such books, accounts, records and data referred to

above for the purposes of this Section 10; and (B) permit the IESO and/or their respective designates to examine and audit and take copies and extracts from such documents.

#### 11. **No Warranty**

Except as specifically set forth or referenced in this Agreement, there are no representations, warranties, or conditions of either Party, express, implied, statutory or otherwise, regarding any matter, including any implied warranties or conditions of quality or fitness for a particular purpose. Without limiting the generality of the foregoing, the Participant acknowledges that its participation in the Energy Manager Program hereunder is based on its own assessment of the Energy Manager Program and not on any reliance on anticipated or projected results, and that such participation may not result in the achievement of any electricity savings or demand savings, which is expressly disclaimed by the Participant.

#### 12. **Limitation of Liability and Indemnity.**

- (a) NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY: (A) IN NO EVENT WILL THE PARTICIPANT BE ENTITLED TO RECOVER FROM THE IESO OR ANY OTHER INDEMNIFIED PARTY (AS DEFINED IN SECTION 12(b) BELOW) FOR ANY LIABILITIES, DAMAGES, OBLIGATIONS, PAYMENTS, LOSSES, COSTS OR EXPENSES UNDER OR IN RELATION TO THIS AGREEMENT: (I) ANY AMOUNT IN EXCESS OF THE ACTUAL COMPENSATORY DIRECT DAMAGES, COURT COSTS AND REASONABLE LAWYERS' AND OTHER ADVISORS' FEES SUFFERED OR INCURRED BY THE PARTICIPANT AND IN ANY EVENT LIMITED TO THE PARTICIPANT INCENTIVE PAID BY THE IESO HEREUNDER; OR (II) DAMAGES (WHETHER DIRECT OR INDIRECT, CONSEQUENTIAL OR OTHERWISE) FOR (X) LOSS OF PROFIT, OR (Y) DIMINUTION OF VALUE OR LOSS OF USE OF ANY PROPERTY; AND (B) THE IESO AND THE INDEMNIFIED PARTIES (AS DEFINED IN SECTION 12(b) BELOW) WILL NOT BE LIABLE TO THE PARTICIPANT, ITS SUCCESSORS OR ASSIGNS OR ITS DIRECTORS, OFFICERS, EMPLOYEES, CONTRACTORS, AGENTS OR REPRESENTATIVES, FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES WHICH MAY ARISE UNDER OR IN RELATION TO THIS AGREEMENT, REGARDLESS OF WHETHER SUCH LIABILITY ARISES UNDER CONTRACT, TORT OR ANY OTHER LEGAL THEORY.
- (b) The Participant (the "**Indemnifying Party**") will indemnify, defend and hold, the IESO, the Government of Ontario, the members of the Government of Ontario's Executive Council and their respective affiliates, and each of the foregoing Person's respective directors, officers, employees, shareholders, advisors, third party service providers and agents (including contractors and their employees) (collectively, the "**Indemnified Party**") harmless from and against any and all Claims, losses, damages, liabilities, penalties, obligations, payments, costs and expenses and accrued interest thereon (including the costs and expenses of, and accrued interest on, any and all actions, suits, proceedings for personal injury (including death) or property damage, assessments, judgments, settlements and compromises relating thereto and reasonable lawyers' fees and reasonable disbursements in connection therewith) (each, an "**Indemnifiable Loss**"), asserted against or suffered by the Indemnified Party relating to, in connection with, resulting from, or arising out of (i) any Claim by, or occurrence or event related to, any third party relating to this Agreement; and/or (ii) the negligence or wilful misconduct of the Participant, except in either case to the extent that any injury or damage related to such Claim, occurrence or event is attributable to the negligence or wilful misconduct of the Indemnified Party. For greater certainty, in the event of contributory negligence or wilful misconduct of the Indemnified Party, then such Indemnified Party will not be indemnified hereunder in the proportion that the Indemnified Party's negligence

or wilful misconduct contributed to any Indemnifiable Loss. The IESO will hold the benefit the Participant's obligations under this Section 12 in the IESO's own right and, in trust, for the benefit of any other Indemnified Party.

### 13. Confidentiality

- (a) Each Party will, in its capacity as a Receiving Party:
  - (i) not use or reproduce Confidential Information of the Disclosing Party for any purpose, other than as and to the extent expressly permitted under this Agreement or as may be reasonably necessary for the exercise of its rights or the performance of its obligations set out in this Agreement;
  - (ii) not disclose, provide access to, transfer or otherwise make available any Confidential Information of the Disclosing Party except as expressly permitted in this Agreement; and
  - (iii) take all measures reasonably required to maintain the confidentiality and security of all Confidential Information of the Disclosing Party that it handles.
  
- (b) The Receiving Party may disclose Confidential Information of the Disclosing Party:
  - (i) to a third party that is not a Representative of the Receiving Party if and to the extent required by a Governmental Authority or otherwise as required by Applicable Laws, provided that the Receiving Party must first give the Disclosing Party notice of such compelled disclosure (except where prohibited by Applicable Laws from doing so) and must use Commercially Reasonable Efforts to provide the Disclosing Party with an opportunity to take such steps as it desires to challenge or contest such disclosure or seek a protective order. Thereafter, the Receiving Party may disclose the Confidential Information of the Disclosing Party, but only to the extent required by Applicable Laws and subject to any protective order that applies to such disclosure; and
  
  - (ii) to:
    - A. its accountants, internal and external auditors and other professional advisors if and to the extent that such Persons need to know such Confidential Information in order to provide the applicable professional advisory services relating to the Receiving Party's business;
  
    - B. potential permitted assignees or successors of the Receiving Party if and to the extent that such Persons need to know such Confidential Information in connection with a potential sale, merger, amalgamation or other transaction or transfer involving the business, assets or services provided by the Receiving Party; and
  
    - C. employees of each Party and its other Representatives if and to the extent that such Persons need to know such Confidential Information to perform their respective obligations under this Agreement;



provided that any such Person is aware of the provisions of this Section 13 and has entered into a written agreement with the Receiving Party that includes confidentiality obligations in respect of such Confidential Information that are no less stringent than those contained in this Section 13.

- (c) Without limiting the foregoing, each Party acknowledges and agrees that:
- (i) the IESO will Handle reports, data and other information, including Confidential Information of the Participant or its subcontractors or Representatives, disclosed, provided or made available to the IESO on an ongoing basis as part of its participation in the Energy Manager Program or other CDM Program offered by the IESO and may do so without further notice to or further consent of the Participant; and the IESO may disclose and provide reports, data and other information, including Confidential Information of the Participant or its subcontractors or Representatives, to the OEB, local distribution or utility companies, the federal Department of Natural Resources, the Ontario Ministry of Energy, Northern Development and Mines and the Office of the Auditor General of Ontario for Handling by such entities provided that the IESO, as the case may be, has in place with any such Person a written agreement that includes confidentiality obligations in respect of such Confidential Information that are comparable to those contained in this Section 13;
  - (ii) the IESO (or its service providers) may disclose information of the Participant, including Confidential Information, to or receive such information from other third parties administering or implementing CDM programs funded by a Governmental Authority (whether administered via the IESO, a local electricity or gas distributor, the Provincial or Federal Government or any other party), and may do so without further notice to or further consent of the Participant, the for the purpose of administering the Energy Manager Program and determining Participant eligibility for a Participant Incentive in the Energy Manager Program;
  - (iii) this Agreement and all Confidential Information in the possession or control of the IESO or the Participant are subject to Applicable Laws that include the access provisions of FIPPA and that as a result, third parties may obtain access to each Party's Confidential Information. Moreover, the IESO and its Representatives are subject to FIPPA, which applies to and governs all recorded information in any form or medium that is provided by the IESO, respectively, or its Representatives to the Participant or provided by the Participant to the IESO, respectively, or its Representatives for the purposes of this Agreement, or created by the Participant in the performance of this Agreement, and that is in the custody or control of the IESO, as the case may be (collectively, the "Records"), and may require the disclosure of such Records to third parties;
  - (iv) each Party is responsible for ensuring that its agreements with Representatives contemplate and permit such potential access or disclosure, and will be fully liable to any such Representatives for any Claim arising out of or relating to such access;
  - (v) the IESO may at any time make public the Participant's participation in the Energy Manager Program and data relating to the Energy Manager, including the achievement of electricity savings and demand savings including the Minimum Annual Savings Target, a

description of the Projects identified by the Energy Manager and the implementation of such Projects by the Participant, aggregated with other studies in a manner intended to report on the Energy Manager Program; and

- (vi) the Participant may acknowledge the assistance provided by the IESO in all public communications, provided that the IESO will have the right to approve in writing all such public communications in advance.

#### 14. Injunctive Relief

Each Party acknowledges that any violation of the provisions of Section 13 may cause irreparable damage or injury to the other Party (including, in the case of the IESO, any of the other Indemnified Parties), the exact amount of which may be impossible to ascertain, and that, for such reason, in addition to any other remedies available to such Party (including, in the case of the IESO, any of the other Indemnified Parties), such Party (including, in the case of the IESO, any of the other Indemnified Parties) is entitled to proceed immediately to court in order to obtain, and the other Party will consent to, interim, interlocutory, and final injunctive relief restraining the other Party from breaching, and requiring the other Party to comply with, its obligations under Section 13, without a requirement that a finding of irreparable harm or other criteria for the awarding of injunctive relief be made. Nothing in this Section 14 will be construed to limit the right of a Party (including, in the case of the IESO, any of the other Indemnified Parties) to obtain injunctive relief in any other circumstance in which it may be otherwise entitled to such relief.

#### 15. FIPPA Compliance

To the extent that the IESO must comply with disclosure obligations under FIPPA, the Participant agrees (without limiting its obligation set out in Section 13):

- (a) to keep the Records in its possession secure;
- (b) to provide the Records to the IESO, as the case may be, within seven calendar days of being directed to do so by the IESO, as the case may be, for any reason under FIPPA, including an access request or privacy issue; and
- (c) to implement other specific security measures that in the reasonable opinion of the IESO, as the case may be, would improve the adequacy and effectiveness of the Participant's measures to ensure, for the purposes of FIPPA, the security and integrity of the Records held in the Participant's possession.

#### 16. Dispute Resolution

If any dispute arises under or in connection with this Agreement that the Parties cannot resolve, each of the Parties will promptly advise its senior management, in writing, of such dispute. Within ten (10) Business Days following delivery of such notice, a senior representative from each Party will meet, either in person or by telephone, to attempt to resolve the dispute. Each senior Representative will be prepared to propose a solution to the dispute. If, following such efforts, the dispute is not resolved, the dispute will be settled by arbitration pursuant to SCHEDULE "B" of this Agreement.

**17. Schedules**

The following schedules are hereby incorporated in and form part of this Agreement:

Schedule "A" - Definitions

Schedule "B" - Arbitration Provisions

Schedule "C" – Form of Release, Waiver and Consent

**18. Headings**

The insertion of headings is for convenience of reference only and will not affect the interpretation of this Agreement. The terms "hereof", "hereunder", and similar expressions refer to this Agreement and not to any particular Article, Section, Schedule or other part hereof. Unless otherwise indicated, any reference in this Agreement to an Article, Section or Schedule refers to the specified article or section of, or schedule to, this Agreement.

**19. Entire Agreement**

Except as otherwise provided, this Agreement, together with the Release, Waiver and Consent and the Program Requirements, constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Agreement. To the extent of any conflict between this Agreement and the Program Requirements, the terms of this Agreement will prevail.

**20. Amendments**

This Agreement may not be varied, amended or supplemented except by an agreement in writing signed by both of the Parties.

**21. Governing Law and Attornment**

This Agreement will be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. For the purpose of all legal proceedings, this Agreement will be deemed to have been made and performed in the Province of Ontario and the courts of the Province of Ontario will have exclusive jurisdiction to entertain any action arising under this Agreement. The IESO and the Participant each hereby attorns to the exclusive jurisdiction of the courts of the Province of Ontario.

**22. Successors and Assigns**

This Agreement will enure to the benefit of and be binding upon the Parties and their respective successors and assigns. This Agreement may not be assigned by the Participant except with the prior written consent of the IESO, which consent may be unreasonably withheld or delayed.

**23. Further Assurances**

Each of the Parties will, from time to time, on written request of the other Party, do all such further acts and execute and deliver or cause to be done, executed and delivered all such further things as may be reasonably required in order to fully perform and to more effectively implement the terms of this Agreement.

**24. Severability**

The invalidity, unenforceability or illegality of any provision in this Agreement will not, to the extent permitted by Applicable Law, affect the validity, enforceability or legality of any other provision of this Agreement, which will remain in full force and effect.

**25. Third Party Beneficiaries**

Except as provided in Sections 8, 10, 12, 13, 14, 15 and this Section 25, this Agreement is solely for the benefit of:

- (a) the IESO and its successors and assigns, with respect to the obligations of the Participant under this Agreement, and
- (b) the Participant and its successors and permitted assigns, with respect to the obligations of the IESO under this Agreement;

and this Agreement will not be deemed to confer upon or give to any other Person any Claim or other right or remedy.

**26. No Partnership, etc.**

Nothing in this Agreement will be deemed to constitute a partnership or joint venture or create any fiduciary relationship between the IESO and the Participant.

**27. Force Majeure**

The IESO shall not be in default and shall not be deemed to be in default, of its obligations in this Agreement by reason of delay or of failure or inability to perform its obligations hereunder where the said delay, failure or inability is due solely to any cause which is unavoidable or beyond the reasonable control of the IESO, including without limitation any act of God or other cause which frustrates the performance of the IESO's obligations in this Agreement.

**28. Notices**

Any notice to be given under this Agreement unless expressly provided otherwise herein must be in writing and will be given by facsimile or e-mail or other means of electronic communication or by hand-delivery as provided. Any notice, if sent by facsimile or e-mail or other means of electronic communication, will be deemed to have been received on the Business Day following the sending, or if delivered by hand will be deemed to have been received on the Business Day it is delivered to the applicable address noted below. Either Party may, by notice of change of address to the other Party, change its address to which notices are to be sent. Notices and other communications must be addressed as follows:

If to the IESO:

Address: 120 Adelaide Street West, Suite 1600  
Toronto, ON M5H 1T1  
Attention: Energy Manager Program  
E-mail: [energymanagers@ieso.ca](mailto:energymanagers@ieso.ca)

If to the Participant:

Address: ●  
Telephone: ●  
Attention: ●  
Fax: ●  
E-mail: ●

#### 29. Counterparts

This Agreement may be executed in any number of counterparts and all such counterparts will, for all purposes, constitute one agreement binding on both Parties provided that each Party has signed at least one counterpart.

#### 30. Facsimile/Electronic Signatures

This Agreement may be executed and delivered by facsimile transmission or by any other method of electronic transmission and the Parties may rely upon all such signatures as though such signatures were original signatures.

*[Remainder of page intentionally left blank.]*

**IN WITNESS WHEREOF** the Parties have executed this Agreement by their duly authorized respective representative(s) as of the date first above written.

**INDEPENDENT ELECTRICITY SYSTEM OPERATOR**

Per:

Name: Evelyn Lundhild

Title: Senior Manager, Program Services

Per:

Name:

Title:

**[I/We]** have authority to bind the IESO

**[I/We]** have authority to bind the Participant

## SCHEDULE "A" DEFINITIONS

In this Agreement, the following terms will have the following meanings:

**"Agreement"** means this Participant Agreement, including all recitals and Schedules, as it or they may be amended, restated or supplemented from time to time.

**"Annual Report"** means the report of energy management activities of a Participant, including documentation to substantiate Energy Savings, completed by the Energy Manager and delivered to the IESO within thirty (30) days before the end of each Funding Period, in the form made available by the IESO from time to time.

**"Applicable Law"** means any applicable law, including any statute, legislation, treaty, regulation and any applicable guideline, directive, rule, standard, requirement, policy, order, judgment, injunction, award or decree of a Governmental Authority.

**"Applicable Taxes"** means any applicable HST and any other applicable sales or use taxes.

**"Business Day"** means a day, other than a Saturday or a Sunday or statutory holiday in the Province of Ontario or any other day on which banking institutions in Toronto, Ontario are not open for the transaction of business.

**"CDM"** means electricity conservation and demand management.

**"Claim"** means any actual, threatened or potential civil, criminal, administrative, regulatory, arbitral or investigative demand, allegation, action, suit, investigation or proceeding or any other claim or demand, whether in contract, tort or otherwise.

**"Commercially Reasonable Efforts"** means all efforts which may be required to enable a Person, directly or indirectly, to satisfy, consummate, complete or achieve a condition, transaction, activity, obligation or undertaking contemplated by this Agreement and which do not require such Person to expend any funds or assume liabilities other than expenditures and liabilities which are reasonable in nature and amount in the context of the purpose of, and the condition, transaction, activity, obligation or undertaking contemplated by, this Agreement.

**"Confidential Information"** of a Party means any and all information of such Party or any of its affiliates, licensors, customers and employees or other service providers, and information on the Energy Manager Application, and, in the case of the IESO, includes the Governmental Authorities (the **"Disclosing Party"**) that has or will come into the possession or knowledge of the other Party, or any of their respective affiliates, licensors, customers and employees or other service providers and, in the case of the IESO, includes the Government Authorities (the **"Receiving Party"**) in connection with or as a result of entering into this Agreement, including information concerning the Disclosing Party's past, present or future customers, suppliers, technology, electricity usage or business. Notwithstanding the foregoing, "Confidential Information" does not include information that is:

- (a) publicly available when it is received by or becomes known to the Receiving Party or that subsequently becomes publicly available other than through a direct or indirect act or omission of the Receiving Party (but only after it becomes publicly available);
- (b) established by evidence to have been already known to the Receiving Party at the time of its disclosure to the Receiving Party and is not known by the Receiving Party to be the subject of an obligation of confidence of any kind;
- (c) independently developed by the Receiving Party without any use of or reference to the Confidential Information of the Disclosing Party as established by evidence that would be acceptable to a court of competent jurisdiction; or
- (d) received by the Receiving Party in good faith without an obligation of confidence of any kind from a third party who the Receiving Party had no reason to believe was not lawfully in possession of such information free of any obligation of confidence of any kind, but only until the Receiving Party subsequently comes to have reason to believe that such information was subject to an obligation of confidence of any kind when originally received;

provided, however, that, for the purposes of this Agreement, all Personal Information concerning any Participant will constitute Confidential Information, whether or not it falls into one of the exceptions set out in clause (a) through (d) of this definition.

**"Confirmed Annual Energy Savings"** are the Energy Savings confirmed by the Technical Reviewer and approved by the IESO as in-service during the applicable Funding Period and persisting until December 31, 2021.

**"Customer"** means an electricity consumer whose Facility or Facilities are directly connected to, or behind the meter of another electricity consumer connected to: (a) the IESO-controlled grid; or (b) a Distribution System.

**“Disclosing Party”** has the meaning given to it in the definition of “Confidential Information”.

**“Distribution System”** means a system connected to the IESO-Controlled Grid for distributing electricity at voltages of 50 kV or less and includes any structures, equipment or other thing used for that purpose.

**“Energy Management Plan”** means a document, substantially in the form made available by the IESO completed by the Energy Manager describing the activities and plans required to reduce energy consumption or demand in such Participant’s Facility or Facilities and detailing how the Participant is demonstrating leadership in the area of energy conservation by, among other things, developing conservation policies and establishing employee, community and peer-to-peer awareness programs.

**“Energy Manager”** means an energy manager, funded by IESO, who meets the Energy Manager Eligibility Criteria that is employed by a Participant and whose primary responsibility is to propose and lead methodologies and processes to reduce energy consumption in a Facility.

**“Energy Manager Application”** means an application submitted by the Participant to access funding for the employment of an Energy Manager as may be approved by the IESO in its absolute and sole discretion.

**“Energy Manager Duties”** means the minimum duties of the Energy Manager, substantially as set out in Appendix 1 to the Program Requirements.

**“Energy Manager Eligibility Criteria”** means the eligibility requirements the Energy Manager must meet in order for the Participant to be eligible for a Participant Incentive, as set out in Appendix 2 to the Program Requirements.

**“Energy Manager Program”** means the Save on Energy program designed to provide funding to a Participant for the purpose of employing an Energy Manager.

**“Energy Savings”** means the estimated, determined or actual kilowatt hour reduction in electricity consumption from a Project or Projects initiated and/or implemented during a Funding Period.

**“Environmental Attributes”** means all benefits and entitlements associated with a Facility or Measure having decreased environmental impacts resulting from the employment of an Energy Manager, including:

- (a) all rights to any fungible or non-fungible attributes, whether arising from a Facility or Measure itself, from the interaction of a Facility or a measure with a Distribution System or the IESO-Controlled Grid or because of applicable Laws and Regulations or voluntary programs established by any Governmental Authority;
- (b) all rights relating to the nature of the energy source as may be defined and awarded through applicable Laws and Regulations or voluntary programs; and specific Environmental Attributes include ownership rights to any applicable credits, entitlements or other instruments resulting from the interaction of a Facility or a Measure with a Distribution System or the IESO-Controlled Grid or as specified by applicable Laws and Regulations or voluntary programs;
- (c) all rights to quantify and register the foregoing with competent authorities; and
- (d) all revenues, entitlements, benefits, and other proceeds arising from or related to the foregoing.

**“Facility”** or **“Facilities”** means the building(s), premises or lands, or part thereof, owned or occupied by the Participant and in respect of which such Participant is participating in the Energy Manager Program.

**“FIPPA”** means the *Freedom of Information and Protection of Privacy Act* (Ontario).

**“Funding Period”** means the 12-month period beginning on the Energy Manager’s employment start date that the Participant is eligible to receive a Participant Incentive, as may be extended for an additional 12-month funding period or shorter by the IESO, acting in its sole discretion.

**“Governmental Authority”** means any federal, provincial, or municipal government, parliament or legislature, or any regulatory authority, agency, tribunal, commission, board or department of any such government, parliament or legislature, or any court or other law, regulation or rule-making entity, having jurisdiction in the relevant circumstances, including the IESO, the OEB, the Electrical Safety Authority, the office of the Auditor General of Ontario, and any Person acting under the authority of any of the foregoing, but excluding the IESO.

**“Handle”** or **“Handling”** means to access, receive, collect, use, store, process, record, disclose, transfer, retain, dispose of, destroy, manage or otherwise handle.

**“HST”** means any tax payable under Part IX of the *Excise Tax Act* (Canada).



“**IESO**” means the Independent Electricity System Operator of Ontario established under Part II of the *Electricity Act, 1998* (Ontario), or its successor.

“**IESO-Controlled Grid**” has the meaning ascribed to it by the IESO Market Rules.

“**IESO EM&V Protocols**” means the methods and processes that the IESO develops for the evaluation, measurement and verification of CDM programs and initiatives, as such methods and processes may be amended from time to time.

“**IESO Market Rules**” means the rules made under section 32 of the *Electricity Act, 1998* (Ontario), together with all market manuals, policies and guidelines issued by the IESO.”

“**Interim Framework**” is the framework for electricity ratepayer-funded energy efficiency programs in the province of Ontario, which began April 1, 2019 as outlined in the March 21, 2019 Ministerial Directive found online at <http://ieso.ca/-/media/Files/IESO/Document-Library/ministerial-directives/2019/Directive-Interim-Framework.pdf?la=en>

“**Insolvent**”, in respect of a Person, means a Person:

- (a) who is for any reason unable to meet its obligations as they generally become due or otherwise acknowledges its insolvency;
- (b) who has ceased paying its current obligations in the ordinary course of business as they generally become due;
- (c) who has ceased to carry on business in the ordinary course;
- (d) who institutes any proceeding, takes any corporate action, or executes any agreement to authorize its participation in or the commencement of any proceeding seeking: (a) to adjudicate it a bankrupt or insolvent; (b) liquidation, dissolution, winding-up, reorganization, arrangement, protection, relief or composition of it or any of its property or debts or making a proposal with respect to it under any law relating to bankruptcy, insolvency, reorganization or compromise of debts or other similar laws; or (c) appointment of a receiver, trustee, agent, custodian or other similar official for it or for any substantial part of its properties and assets; or
- (e) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

“**kW**” means a kilowatt

“**Laws and Regulations**” means:

- (a) applicable multi-national, international, federal, provincial or municipal laws, orders-in-council, by-laws, codes, rules, policies, regulations and statutes;
- (b) applicable orders, decisions, codes, manuals, interpretation bulletins, judgments, injunctions, decrees, awards, directives and writs of any court, tribunal, arbitrator, Governmental Authority or other Person having jurisdiction;
- (c) applicable rulings and conditions of any licence, permit, certificate, registration, authorization, consent and approval issued by a Governmental Authority; and
- (d) any requirements under or prescribed by applicable common law.

“**Measures**” means: (i) any activity undertaken for the primary purpose of obtaining or effecting, directly or indirectly, CDM, including the installation, retrofit, replacement, modification or commissioning of equipment, systems, processes or behaviours that consume or result in the consumption of electricity; or (ii) any equipment, system or product related to the foregoing.

“**MWh**” means a megawatt hour.

“**OEB**” means the Ontario Energy Board or its successor.

“**Person**” means a natural person, firm, trust, partnership, association, unincorporated organization, limited partnership, company or corporation (with or without share capital), joint venture, sole proprietorship, Governmental Authority or other entity of any kind.

“**Personal Information**” means information about identifiable individual or other information that is subject to any Privacy Laws.

**“Privacy Laws”** means all federal, provincial, state, municipal or other applicable statutes, laws or regulations of any Governmental Authority in any jurisdiction governing the Handling of information about an identifiable individual, including the *Personal Information and Protection of Electronic Documents Act (Canada)*, FIPPA, MFIPPA and equivalent provincial legislation.

**“Program Eligibility Criteria”** means the eligibility criteria the Participant must meet to the satisfaction of the IESO to be eligible for a Participant Incentive, as set out in the Program Requirements.

**“Program Requirements”** means the program requirements for the Energy Manager Program made available by the IESO, as updated from time to time.

**“Project”** means one or more Measures, which, when implemented in respect of a Facility, are expected to deliver Energy Savings towards the Minimum Annual Savings Target.

**“Receiving Party”** has the meaning given to it in the definition of “Confidential Information”.

**“Release, Waiver and Consent”** means the release and waiver and consent substantially in the form of SCHEDULE “C”, executed by the Participant in favour of the IESO, among others, and submitted by the Participant.

**“Reports”** means, collectively, the set of reports to be submitted to the IESO and/or the Technical Reviewer, including the Energy Management Plan, the Third Quarter Report and the Annual Report.

**“Representative”** means, in respect of one of the Parties, any one of that Party’s employees, officers, directors, shareholders, contractors, agents, representatives and advisors.

**“Shortfall Amount”** means (i) the total Energy Savings (MWh) of the Minimum Annual Savings Target not achieved by the Participant in their previous funding period under the Participant Agreement; and/or (ii) where the Participant was previously the counterparty to an agreement that provided funding or a financial incentive paid by the IESO and/or Local Distribution Company (LDC) to the Participant for the employment of an Energy Manager, the total Energy Savings (MWh) required by such agreement which were not achieved by the Participant during the term of that agreement.

**“Technical Reviewer”** means the IESO or an organization contracted by the IESO, for the purpose of delivering services such as but not limited to reviewing information submitted by Participants and determining Confirmed Annual Energy Savings.

**“Third Quarter Report”** means the report of energy management activities of a Participant, including documentation to substantiate claimed Electricity Savings, completed by an Energy Manager and delivered to the IESO within thirty (30) days before the end of the third quarter of each 12-month Funding Period, in the form made available by the IESO from time to time.

**SCHEDULE "B"**  
**ARBITRATION PROVISIONS**

- (a) Subject to and in accordance with the provisions of this SCHEDULE "B", any and all differences, disputes, Claims or controversies arising out of or in any way connected with this Agreement, whether arising before or after the expiration or termination of this Agreement, (including any dispute as to whether an issue is arbitrable) will be resolved by arbitration before a single arbitrator (the "**Arbitrator**") pursuant to the *Arbitration Act, 1991* (Ontario) and otherwise in accordance with the laws of the Province of Ontario.
- (b) A Party desiring arbitration hereunder will give written notice of arbitration to the other Party containing a concise description of the matter submitted for arbitration ("**Notice of Arbitration**"). If the Parties fail to jointly appoint an Arbitrator within 20 days thereafter, an Arbitrator will be designated by a judge of the Ontario Superior Court of Justice upon application by either Party. The Arbitrator may determine all questions of law, fact and jurisdiction with respect to the dispute or the arbitration (including questions as to whether a dispute is arbitrable) and all matters of procedure relating to the arbitration. The Arbitrator may grant legal and equitable relief (including injunctive relief), award costs (including legal fees and the costs of the arbitration), and award interest.
- (c) The arbitration will be conducted in English in the City of Toronto (unless otherwise agreed to by the Parties) at such place therein and time as the Arbitrator may fix and, failing agreement thereto by the Parties, in accordance with such procedures as the Arbitrator will determine, in accordance with the principles of natural justice. The arbitration and all matters arising directly or indirectly therefrom will be kept strictly confidential by the Parties and will not be disclosed to any third party except as may be compelled by law.
- (d) The Arbitrator's written decision will be delivered to each of the Parties within 60 days following the conclusion of the arbitration hearing. The costs of any arbitration hereunder will be borne by the Parties in the manner specified by the Arbitrator in his or her decision. The decision of the Arbitrator will be final and binding upon the Parties in respect of all matters relating to the arbitration, the conduct of the Parties during the proceedings and the final determination of the issues in the arbitration. There will be no appeal from the decision of the Arbitrator to any court, except on the grounds that the conduct of the Arbitrator, or the decision itself, violated the provisions of the *Arbitration Act, 1991* (Ontario), or solely on a question of law as provided for in such act. Judgment upon any award rendered by the Arbitrator may be entered in any court having jurisdiction thereof.
- (e) Submission to arbitration under this SCHEDULE "B" is intended by the Parties to preclude any action in matters which may be arbitrated hereunder, save and except for enforcement of any arbitral award hereunder.

**SCHEDULE "C"**  
**FORM OF RELEASE, WAIVER AND CONSENT**

**RELEASE, WAIVER AND CONSENT**

**FOR VALUABLE CONSIDERATION**, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby, for itself and its successors and assigns:

- A. releases and forever discharges the Independent Electricity System Operator (“**IESO**”) and their respective representatives, affiliates, third party service providers and agents (collectively, the “**Program Operators**”) and all of the respective past, present and future officers, directors, employees, owners, shareholders, agents, successors and assigns of the Program Operators (collectively, the “**Representatives**”) (the Program Operators and the Representatives hereinafter collectively referred to as “**Releasees**”) from any and all actions, causes of action, suits, complaints, disputes, debts, liabilities, obligations, damages, legal fees, costs, disbursements, expenses, claims and demands of every nature or kind whatsoever and howsoever arising, at law or in equity, or under any statute, including without limitation, claims for property damage, business interruption and personal injury of the undersigned’s employees, officers, directors or licensees, which it can, will or may have by reason of any matter, cause or thing arising as a result of, in relation to or in connection with the initiatives funded by the IESO for electricity conservation and demand management and directed at one of the commercial, institutional or industrial electricity consumer groups (collectively referred to as the “**CDM Program**”), other than in the case of the gross negligence or willful misconduct of such Representatives;
- B. agrees that the undersigned will not make any claim or take any proceedings against any other person or entity with respect to any matter released and discharged in Section 1 above which may result in any claim arising against any of the Releasees for contribution or indemnity or other relief;
- C. without limiting the foregoing, the undersigned acknowledges, agrees and consents that by submitting an application (“**Application**”) to participate in a CDM Program (including the Energy Manager Program) or any initiative thereof, whether or not its Application is ultimately accepted:
- (a) it hereby consents to the collection, use, disclosure and other handling of any information it provides to the Program Operators, including all reports, data, personal information, records showing historical energy use and consumption, and other information of the undersigned or its subcontractors or representatives (collectively, the “**Applicant Information**”) by the Program Operators for purposes relating to the operation, administration or assessment of the CDM Program, any initiative thereof or the Application, and in connection with any reporting activities relating to the CDM Program, which shall include, without limitation: (i) sharing of Applicant Information among the Program Operators; (ii) use by the Program Operators of the Applicant Information provided by the Participant to process any of the undersigned’s Applications and to conduct, analyze and report on the results of surveys and modify the CDM Program based on such surveys; and (iii) disclosure to the Ontario Energy Board, the Independent Electricity System Operator, local distribution or utility companies, the Ontario Ministry of Energy, Northern Development and Mines or the office of the Auditor General of Ontario or their respective successors. The Participant agrees that the IESO may contact the Participant directly including by email and other electronic communication for purposes of follow-up surveys, studies and audits, future conservation programs, customer satisfaction surveys and other related purposes. The Participant may withdraw its consent at any time by contacting the IESO at [customer.relations@ieso.ca](mailto:customer.relations@ieso.ca);
  - (b) it hereby consents to the disclosure by the IESO of information regarding the Participant’s past participation in other IESO funded conservation and demand management programs for the purpose of processing the Participant’s Application;
  - (c) it hereby consents to the disclosure by local distribution or utility companies to the IESO of information regarding the Participant’s past participation in other IESO or government-funded conservation and demand management programs for the purpose of processing the Participant’s Application and administering CDM Programs;
  - (d) the Program Operators are committed to protecting the personal information in its custody or control in accordance with applicable privacy laws. The Participant may access the IESO’s privacy policy at <http://www.ieso.ca/Privacy>; and
  - (e) this Release, Waiver and Consent and all Applicant Information, in the possession or control of the IESO are subject to applicable laws that include the access provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (Ontario) (“**MFIPPA**”) or the *Freedom of Information and Protection of Privacy Act* (Ontario) (“**FIPPA**”), as the case may be, and that as a result, third parties may obtain access to the Applicant Information;
- D. the foregoing Release, Waiver and Consent will continue in full force and effect for the benefit of the Releasees and will apply to each Application submitted by the undersigned to the IESO and to the extent of any conflict between this Release, Waiver and Consent and the terms of any agreement or other document entered into by the undersigned and one or more of the Program Operators pursuant to or in

connection with the CDM Program or any part thereof, or any initiative under any CDM Program, the terms of this Release, and Waiver and Consent will prevail; and

- E. this Release, Waiver and Consent will be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

**IN WITNESS WHEREOF** the undersigned has executed this Release, Waiver and Consent by its duly authorized representative(s) as of the date below written.

Dated: \_\_\_\_\_

**[LEGAL NAME OF PARTICIPANT]**

\_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Name:  
Title:

**[I/We]** have the authority to bind the corporation